

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

In the Matter of	)	
	)	
Redesignation of the 17.7-19.7 GHz	)	
Frequency Band, Blanket Licensing of	)	
Satellite Earth Stations in the 17.7-20.2 GHz	)	IB Docket No. 98-172
and 27.5-30.0 GHz Frequency Bands, and the	)	RM-9005
Allocation of Additional Spectrum in the	)	RM-9118
17.3-17.8 GHz and 24.75-25.25 GHz	)	
Frequency Bands for Broadcast Satellite-	)	
Service Use	)	

CONSOLIDATED OPPOSITION OF HUGHES COMMUNICATIONS, INC. AND  
HUGHES COMMUNICATIONS GALAXY, INC.

Hughes Communications, Inc. and Hughes Communications Galaxy, Inc.

("Hughes") hereby submit their Consolidated Opposition<sup>1</sup> to (i) the Petition for Interim Relief of the Fixed Point-to-Point Communications Section, Wireless Communications Division of the Telecommunications Industry Association (the "Fixed Point-to-Point Section") and (ii) the Emergency Request for Immediate Relief filed by the Independent Cable Telecommunications Association ("ICTA", and collectively with the Fixed Point-to-Point Section, the "Petitioners").

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<sup>1</sup> Hughes has consolidated its Opposition to these two pleadings, which involve the same issues, were filed in the docket at about the same time, and were not served on Hughes, in order to reduce the volume of the pleadings and otherwise conserve Commission resources.

In the Notice of Proposed Rulemaking,<sup>2</sup> the Commission indicated that any terrestrial systems applied for in the 17.7 - 19.7 GHz band (the “18 GHz band”) between September 18, 1998 and the release of a report and order in this proceeding would be subject to the outcome of this proceeding. That is, any post-NPRM terrestrial license that was applied for and granted after the release of the NPRM with respect to a band that is *ultimately* designated for primary fixed satellite service (FSS) use, will be secondary to that primary FSS use. The Commission justifiably could have frozen the acceptance and processing of all applications in the 18 GHz band, but it has not yet done so.

At bottom, both ICTA and the Fixed Point-to-Point Section request that the Commission immediately reverse the course charted in the NPRM by (i) permitting unlimited, primary licensing of terrestrial fixed services in the 18 GHz band from September 18, 1998 through the Commission’s adoption of a report and order in this proceeding, and (ii) grandfathering, on a co-primary basis, an unlimited number of terrestrial fixed facilities that may be applied for and licensed during that period.

The Commission should not take the requested action because to do so would preclude a rational transition to a new set of service rules for the 18 GHz band and would adversely affect the implementation of the Commission’s overall plan for this band. Furthermore, as satellite earth station licensing in the 18 GHz band is effectively frozen pending the resolution of the NPRM, the Petitioners’ approach would provide terrestrial interests the unfair advantage of being able to deploy their systems with impunity, and with the hope that they

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<sup>2</sup> *Redesignation of the 17.7-19.7 GHz Frequency Band, Blanket Licensing of Satellite Earth Stations in the 17.7-20.2 GHz and 27.5-30.0 GHz Frequency Bands, and the Allocation of Additional Spectrum in the 17.3-17.8 GHz and 24.75-25.25 GHz Frequency Bands for Broadcast Satellite-Service Use*, FCC 98-235 (rel. September 18, 1998) (“NPRM”).

will be able to pass their construction costs on to the satellite industry in the form of relocation expenses.

I. HUGHES AND OTHER SATELLITE INTERESTS NEED A RAPID RESOLUTION OF THE COMMISSION'S NPRM

Both the ICTA and the Fixed Point-to-Point Section pleadings focus primarily on the hardships that the Commission's NPRM is allegedly creating for the terrestrial fixed service industry.<sup>3</sup> While the rule changes proposed in the NPRM may disrupt the terrestrial industry, as almost all rule changes, by definition, create some disruption, the Commission should not be left with the impression that the terrestrial fixed service is alone in bearing costs associated with the uncertainty inherent in the NPRM. To the contrary, Hughes and other satellite interests need certainty and rapid resolution in this proceeding just as badly as the terrestrial fixed service interests. As a practical matter, without the development of an appropriate blanket licensing system for Ka band earth stations, Hughes will not be able to finish its design for, and the deployment of, its revolutionary Ka band satellite system that will provide new telecommunications service choices and lower prices, and offer competitive alternatives for both individuals and small businesses.

Hughes has a vital interest in the NPRM, as both the FCC licensee of the Spaceway Ka band satellite system and as an applicant in the second Ka band processing round for the Spaceway EXP and Spaceway NGSO satellite networks. Hughes began planning for the development of Ka band satellite systems well before it submitted its application for the Spaceway system in December 1993. In the past five years, Hughes has invested tens of

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<sup>3</sup> The ICTA and the Fixed Point-to-Point Section pleadings also attack the substantive proposals within the NPRM. Hughes reserves its substantive views on the NPRM proposals for its comments on the NPRM.

thousands of man-hours and millions of dollars pursuing its vision of offering the first affordable, two-way, broadband satellite services to telecommunications users for whom high-speed, two-way communications currently are unavailable or unaffordable.

Thus while ICTA makes much of the expansion plans that some of its members may *choose* to halt pending the resolution of this proceeding, as a practical matter Hughes is *unable* to finalize its spacecraft design until it can select for the Spaceway system an appropriate 500 MHz of downlink spectrum within the 17.7 - 18.8 GHz band of spectrum that is at issue here.<sup>4</sup> And while ICTA bemoans the expenditures that its members are making even after the release of the NPRM,<sup>5</sup> the pendency of the NPRM means that Hughes cannot begin to recoup the millions of dollars it has expended to date in development of the Spaceway system. Moreover, while ICTA alleges that small business operators of terrestrial fixed service systems have been especially hard hit by the Commissions NPRM, the small businesses to whom Hughes will market Spaceway will not have the choice to use Spaceway as an alternative to the local loop until this proceeding is resolved.<sup>6</sup>

However, the fact that the satellite and terrestrial communities will incur financial burdens while this proceeding remains pending does not mean that the Commission has done anything wrong here. To the contrary, the uncertainty that gives rise to such burdens is a

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<sup>4</sup> See *Hughes Communications Galaxy*, DA 97-971 at ¶20 (rel. May 9, 1997).

<sup>5</sup> Certainly, any expenditures that the terrestrial industry may make after the publicly announced September 18, 1998 cut off in the 18 GHz band are (i) at its own risk and (ii) irrelevant to the merits of this proceeding. Cf. ICTA Request at 10-11 (noting that some terrestrial operators have continued to spend money, unaware of the public release of the NPRM on that date).

<sup>6</sup> Thus, the obligation to consider the impact of this proceeding on small businesses applies with equal force on the satellite side. See ICTA Request at 10, n.26 (citing Commission obligations under the Flexibility Act of 1980, 5 U.S.C. § 603, Communications Act, § 623(i), 47 U.S.C. § 543(i)).

“necessary evil” in the process of conducting a rulemaking. Furthermore, that both terrestrial and satellite interests may feel pain from the pendency of the NPRM simply highlights the difficult choices that the Commission faces in redesignating the 18 GHz band. If one side were allowed to proceed with the deployment of its systems without regard to the consequences of this rulemaking, that side would have no incentive to work toward an acceptable compromise.

## II. THE COMMISSION’S LICENSING APPROACH IS RATIONAL AND NECESSARY

The NPRM proposes to license only on a secondary basis any terrestrial fixed applications received after the date of the NPRM for spectrum in the 17.7 - 19.7 GHz range that *ultimately* is designated as an FSS primary band.<sup>7</sup> This proposal appropriately recognizes the problems and inequities that could develop absent some restriction on the otherwise unfettered ability of the terrestrial fixed service to continue to deploy systems in the 18 GHz band pending the resolution of the NPRM. As the Commission has recognized in a number of other analogous circumstances, continued licensing in a band that is the subject of a pending band segmentation proposal can preclude a rational and orderly transition to the Commission’s ultimate, modified band plan. In other words, this approach is necessary to ensure that the goals of the rulemaking are not compromised by continued licensing of terrestrial systems in the meantime.

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<sup>7</sup> NPRM at ¶ 40. ICTA and the Fixed Point-to-Point Section seem to construe the Commission’s secondary licensing to apply only to the 18.3 - 18.55 GHz and 18.8 - 19.3 GHz bands. To the contrary, the Commission’s NPRM states that “new terrestrial fixed service applications could continue to be filed and granted after the NPRM release date, but the licensees would only have secondary status in those bands designated for fixed satellite service use on a primary basis.” *Id.* The Commission cited the 18.3 - 18.55 GHz and 18.8 - 19.3 GHz bands merely as an “example” of how this scheme would work if the Commission’s segmentation proposal in the NPRM *ultimately* were adopted. If it is to work, the Commission’s approach must be applicable to any part of the 18 GHz band that ultimately is designated for the FSS on a primary basis. Otherwise, the proposal would not be effective if the Commission should alter its band plan proposal.

The Commission has often imposed restrictions on the filing of applications during the pendency of rulemaking proceedings. Those restrictions have often included an outright freeze on the acceptance or processing of licensing applications.<sup>8</sup> It is perfectly obvious why, when the Commission proposes to reallocate or redesignate a portion of spectrum, it should halt further licensing in that band pending that reallocation. Where a band is proposed to be divided between competing uses, new licensees should not be permitted to continue to “settle” in the disputed territory, creating by their presence a larger obstacle to the ultimate Commission decision, and causing any reallocation to be far more difficult and costly for the other side.

ICTA and the Fixed Point-to-Point Section completely ignore the underlying necessity of the restrictions imposed here. Their pleadings instead focus on allegations of harmful effects that may befall the Petitioners, and refer to inapposite case law.

The Commission has often imposed freezes where it proposes to reallocate or redesignate spectrum to a new use, and thus must ensure that the decision can be achieved with a minimum of disruption and cost. In a proceeding presenting many of the issues also presented here, and involving part of the 18 GHz band, the Commission in 1996 froze licensing at 18.820-18.920 and 19.160-19.260 GHz.<sup>9</sup> That freeze was due to a dispute about the potential for

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<sup>8</sup> See, e.g., *Kessler v. FCC*, 326 F.2d 673 (D.C. Cir. 1963). There is no basis for ICTA’s suggestion that the absence a requirement for notice and comment in a decision implementing a freeze should be affected by the nature of the applications to which the freeze applies. See ICTA Request at 12, n.29 (suggesting that imposition of a freeze without notice is procedurally acceptable in the context of “paper” applications, but is “questionable” in this case).

<sup>9</sup> *Freeze on the Filing of Applications for New Licenses, Amendments, and Modifications in the 18.8-19.3 GHz Frequency Band*, 11 FCC Rcd 22363 (1996).

interference between satellite and terrestrial signals,<sup>10</sup> which, of course, is the basis for the Commission's 18 GHz band segmentation proposal in the NPRM. As here, the freeze was implemented in order to prevent new licensees from becoming entrenched in spectrum from which they might eventually have to be relocated: to "maintain the Commission's regulatory options in the band" pending resolution of the matter.<sup>11</sup> The same rationale that applied in the Teledesic/DEMS matter applies with even greater force here, as there are even more companies and services involved, and potentially greater consequences.

There are many other cases where the Commission has frozen applications pending the resolution of a significant rulemaking proceeding. For example, in connection with its lengthy inquiry into Advanced Television, the Commission froze the TV Table of Allotments in thirty metropolitan areas.<sup>12</sup> As here, it did so to preserve available spectrum, and thus its spectrum allocation options.<sup>13</sup> And when the Commission proposed to accommodate low power video remote broadcast service in a portion of spectrum formerly used exclusively for low power aural broadcast, its first action again was to freeze applications by the existing users.<sup>14</sup> More recently, the Commission froze terrestrial applications in the 39 GHz band during the pendency

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<sup>10</sup> See *Amendment to the Commission's Rules to Relocate the Digital Electronic Message Service from the 18 GHz Band to the 24 GHz Band and to Allocate the 24 GHz Band for Fixed Service*, 12 FCC Rcd 3471 (1997).

<sup>11</sup> *Id.* at ¶ 11.

<sup>12</sup> *Advanced Television Systems and their Impact on the Existing Television Broadcast Service*, 76 Rad Reg 2d (P&F) 843 (1987).

<sup>13</sup> See, e.g., *Greater Utica-Rome TV Services, Inc.*, 7 FCC Rcd 2252, ¶2 (1992).

<sup>14</sup> See *Review of Technical and Operational Requirements: Part 74-E Aural Broadcast, Further Notice of Proposed Rule Making*, 2 FCC Rcd 3129, ¶15 (1987).

of a petition for rulemaking that sought the adoption of new application processing and technical rules in the 39 GHz band.<sup>15</sup>

No doubt, spectrum reallocations and redesignation proceedings are the most obvious and compelling candidates for freezes. But in other, often less compelling, circumstances, the Commission has also properly imposed and maintained freezes. When the Commission undertook to modify rules pertaining to FM translator stations to allow increased programming options, the Commission instituted a freeze in order to avoid inundating itself with translator applications filed in anticipation of a change in rules that would allow existing translators to originate programming.<sup>16</sup>

Petitioners try to distinguish 18 GHz from a number of other instances where the Commission has imposed freeze orders for essentially administrative reasons. For example, the Commission in 1995 issued a freeze on new applications in *General Category Frequencies in 806-809.75/851-854.750 MHz Bands*, 10 FCC Rcd 13190 (1995). That freeze was consciously directed at the deluge of speculative applications received by the Commission as a result of

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<sup>15</sup> See *Amendment of the Commission's Rules Regarding the 37.0-38.6 GHz and 38.6-40 GHz Bands*, 11 FCC Rcd 1156 (1995); *Amendment of the Commission's Rules Regarding the 37.0-38.6 GHz and 38.6-40 GHz Bands*, 12 FCC Rcd 2910, ¶15 (1997) ("Unless we take this approach, we run the risk of undermining our efforts to optimize the public interest."). ICTA's attempt to distinguish this case fails. ICTA claims that the 39 GHz freeze is different because it "affected all prospective users of the spectrum similarly." ICTA Request at Attach. C, p.2. As noted above, satellite earth station applications are effectively frozen in the 18 GHz band until this rulemaking, which is about the terms for licensing Ka band satellite earth stations, is resolved.

<sup>16</sup> See *Amendment of Part 74 of the Commission's Rules Concerning FM Translator Stations*, 3 FCC Rcd 3664, ¶62 (1988).



regulatory changes it had made.<sup>17</sup> Similarly, the Commission has imposed such essentially administrative freezes in its processing of applications for MDS,<sup>18</sup> and for other licenses.

The Petitioners' arguments miss the mark. The Commission obviously did not impose the restrictions in the NPRM in order to stem a flood of applicants, or to prevent speculation and warehousing. These restrictions were imposed in order to *preserve the status quo* pending a potentially significant redesignation of spectrum, and ultimately in order to preserve the Commission's ability freely to redesignate that spectrum between competing, and apparently incompatible, users at the end of the proceeding. That the Commission has decided to impose freezes for administrative reasons -- essentially, to cut down on what was perceived as an inordinately high volume of applicants<sup>19</sup> -- only serves to highlight the need to adopt at least the less-intrusive secondary licensing approach taken in this case, where significant substantive disputes exist about how to redesignate the 18 GHz band.

Similarly, the citation by the Fixed Point-to-Point Section to a single case where the Commission lifted a freeze is inapposite.<sup>20</sup> To be sure, the Commission has in the past lifted freeze orders. It may do so when the negative impact of the freeze outweighs its benefits.<sup>21</sup> However, in this case the benefits of the Commission's licensing approach clearly outweigh its negative impacts.

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<sup>17</sup> See *Memorandum Opinion and Order and Order on Reconsideration*, 1998 FCC LEXIS 3889.

<sup>18</sup> *Amendment of Parts 1, 2, and 21 of the Commission's Rules Governing Use of the Frequencies in the 2.1 and 2.5 GHz Bands*, 7 FCC Rcd 3266, ¶19 (1992) ("MDS").

<sup>19</sup> See, e.g., *MDS*, 7 FCC Rcd 3266, ¶5 ("torrent of MDS filings" left backlog of 20,000 applications).

<sup>20</sup> See *Amendment of the Commission's Rules to Provide Channel Exclusivity to Qualified Private Paging Systems at 929-930 MHz*, 8 FCC Rcd 2460 (1993).

<sup>21</sup> See *id.*

To reverse course at this stage would severely bias the outcome of the pending rulemaking. In particular, if the Commission allowed terrestrial interests to continue to deploy without regard to the outcome of the rulemaking, the Commission would provide terrestrial interests a significant and unfair advantage. Namely, they could continue to deploy their systems with impunity, and with the hope that they could (i) develop political support for their arguments by “squatting” in the bands at issue and then arguing that any relocation would result in undue disruption, or (ii) if they were forced to relocate, try to pass their construction costs on to the satellite industry in the form of relocation expenses. In contrast, the satellite industry could not have any such ability or advantage. By definition, this proceeding is about how ubiquitous satellite earth stations can be licensed in the 18 GHz band. Until that issue is resolved, the 18 GHz band effectively is frozen for satellite earth station licensing.

Moreover, the Commission rationally could have, and perhaps should have, instituted a full freeze on acceptance and processing of all applications for terrestrial and earth station licenses in the 18 GHz band. Thus, the Commission cannot be faulted for adopting the least intrusive means for achieving the desired result: a rational and orderly transition to the Commission’s ultimate plan for the 18 GHz band.

### III. CONCLUSION

For all the foregoing reasons, Hughes urges the Commission to deny in full the Petition for Interim Relief of the Fixed Point-to-Point Communications Section, Wireless Communications Division of the Telecommunications Industry Association and the Emergency Request for Immediate Relief filed by the Independent Cable Telecommunications Association.

Respectfully submitted,

HUGHES COMMUNICATIONS, INC.  
HUGHES COMMUNICATIONS  
GALAXY, INC.



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Of Counsel

Scott B. Tollefsen  
Senior Vice President and General Counsel  
Hughes Communications, Inc.  
1500 Hughes Way  
Long Beach, CA 90810  
(310) 525-5150

Gary M. Epstein  
John P. Janka  
Arthur S. Landerholm  
LATHAM & WATKINS  
1001 Pennsylvania Ave., N.W.  
Suite 1300  
Washington, DC 20004  
(202) 637-2200

## **CERTIFICATE OF SERVICE**

I hereby certify that I have this twelfth day of November, 1998, caused a true copy of the foregoing "Consolidated Opposition Of Hughes Communications, Inc. and Hughes Communications Galaxy, Inc." to be served by first class mail, postage prepaid, or by hand delivery as indicated, on the following:

\*Chairman William Kennard  
Federal Communications Commission  
1919 M Street, NW, Room 814  
Washington, D.C. 20554

\*Commissioner Susan Ness  
Federal Communications Commission  
1919 M Street, NW, Room 832  
Washington, D.C. 20554

\*Commissioner Harold Furchtgott-Roth  
Federal Communications Commission  
1919 M Street, NW, Room 802  
Washington, D.C. 20554

\*Commissioner Michael Powell  
Federal Communications Commission  
1919 M Street, NW, Room 844  
Washington, D.C. 20554

\*Commissioner Gloria Tristani  
Federal Communications Commission  
1919 M Street, NW, Room 826  
Washington, D.C. 20554

\*Regina M. Keeney  
International Bureau  
Federal Communications Commission  
2000 M Street, NW, Room 800  
Washington, D.C. 20554

\*Roderick K. Porter  
International Bureau  
Federal Communications Commission  
2000 M Street, NW, Room 800  
Washington, D.C. 20554

\*Richard Engelman  
International Bureau  
Federal Communications Commission  
2000 M Street, NW, Room 800  
Washington, D.C. 20554

\*Charles Magnuson  
International Bureau  
Federal Communications Commission  
2000 M Street, NW, Room 800  
Washington, D.C. 20554

\*Thomas Tycz  
International Bureau  
Federal Communications Commission  
2000 M Street, NW, Room 800  
Washington, D.C. 20554

\*Cassandra Thomas  
International Bureau  
Federal Communications Commission  
2000 M Street, NW, Room 810  
Washington, D.C. 20554

\*Fern Jarmulnek  
International Bureau  
Federal Communications Commission  
2000 M Street, NW, Room 518  
Washington, D.C. 20554

\*Diane Garfield  
International Bureau  
Federal Communications Commission  
2000 M Street, NW, Room 598  
Washington, D.C. 20554

\*Thomas N. Albers  
International Bureau  
Federal Communications Commission  
2000 M Street, NW, Room 866  
Washington, DC 20554

Jonathan D. Blake  
Gerard J. Waldron  
Erin M. Egan  
COVINGTON & BURLING  
1201 Pennsylvania Ave., NW  
Washington, D.C. 20044

William J. Burhop  
Independent Cable & Telecommunications Assoc.  
5335 Wisconsin Ave., N.W.  
Suite 800  
Washington, D.C. 20015

Leonard Robert Raish  
Fletcher, Heald & Hildreth, PLC  
1300 North 17th Street - 11th floor  
Arlington, VA 22209

Andrew R. D'Uva  
Willkie Farr & Gallagher  
1155 21st Street, NW, Ste. 600  
Washington, D.C. 20036

Philip L. Malet  
Steptoe & Johnson  
1330 Connecticut Ave.  
Washington, DC 20036

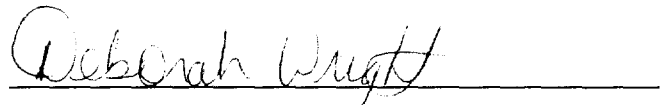
David G. O'Neil  
Rini Coran & Lancellotta  
1350 Connecticut Ave., NW, Ste. 900  
Washington, DC 20036

Thomas R. Gibbon  
Anthony M. Black  
Bell, Boyd & Lloyd  
1615 L Street, NW, Ste. 1200  
Washington, DC 20036

Peter A. Rohrbach  
Karis A. Hastings  
Hogan & Hartson  
555 13th Street, NW  
Washington, D.C. 20004

Raymond G. Bender, Jr.  
Dow Lohnes & Albertson  
1200 New Hampshire Ave., NW, Ste. 800  
Washington, DC 20036

\* By hand delivery

A handwritten signature in cursive script, reading "Deborah Wright", is written over a horizontal line.

Deborah Wright